



UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

UNITED STATES OF AMERICA,

Civil No. 4-80-469

Plaintiff,

and

STATE OF MINNESOTA, by its
Attorney General Hubert H.
Humphrey, III, its Department
of Health, and its Pollution
Control Agency,

Plaintiff-Intervenor,

v.

REILLY TAR & CHEMICAL CORPORATION;
HOUSING AND REDEVELOPMENT AUTHORITY
OF ST. LOUIS PARK; OAK PARK VILLAGE
ASSOCIATES; RUSTIC OAKS CONDOMINIUM,
INC.; and PHILIP'S INVESTMENT CO.,

Defendants,

and

CITY OF ST. LOUIS PARK,

Plaintiff-Intervenor,

v.

REILLY TAR & CHEMICAL CORPORATION,

Defendant,

and

CITY OF HOPKINS,

Plaintiff-Intervenor,

v.

REILLY TAR & CHEMICAL CORPORATION,

Defendant.

SUPPLEMENTAL
AFFIDAVIT OF
EDWARD J. SCHWARTZBAUER

STATE OF MINNESOTA)
) SS.
COUNTY OF HENNEPIN)

EDWARD J. SCHWARTZBAUER, being first duly sworn,
states as follows.

I am one of the attorneys for Reilly Tar & Chemical Corporation ("Reilly"), one of the defendants in this action.

I make this affidavit in order to comply with the requirements of Rule 56(f) of the Federal Rules of Civil Procedure. Reilly is unable to present by affidavit or deposition any facts other than those already presented in opposition to the State of Minnesota's motion for partial summary judgment on Reilly's second affirmative defense (settlement) plus the affidavit of P. C. Reilly, the supplemental affidavit of Thomas E. Reiersgord, and this affidavit, for the following reasons.

As Reilly's legal memoranda disclose, there were no direct negotiations in 1972 between it and the State of Minnesota ("the State"). However, it was Reilly's belief at that time, and still is, that the City of St. Louis Park ("the City") was negotiating on behalf of the State as the State's agent, and that the settlement agreement dated April 14, 1972 (RTC ex. 31) was in fact entered into on behalf of both the City and the State. This is the principal basis for Reilly's first affirmative defense. However, Reilly's attempts to demonstrate that to date have been frustrated in several ways.

First, as disclosed by my affidavit of September 2, 1983, and by the depositions of Lindall, Van de North, Popham, Worden and Macomber, the lawyer-negotiators have refused to answer questions as to whether the City was acting as the State's agent and related questions on the ground that the communications between Lindall and Macomber which established the agency relationship are privileged communications.

Second, as indicated to the court on oral argument, Thomas J. Ryan, Executive Vice President of Reilly in 1972, is deceased. Mr. Ryan is the Reilly official who dealt directly with Thomas E. Reiersgord, Reilly's attorney at that time and with the City in connection with the settlement negotiations.

Third, George R. Koonce, the State PCA official who was closest to the negotiations is disabled and unable to testify. The importance of Mr. Koonce's testimony can be seen from the following documents which are already marked as exhibits and which were submitted to the Court.

RTC ex. 1 is a PCA internal memorandum prepared by Mr. Koonce concerning a discussion with Harvey McPhee, the City Health officer, dated May 26, 1969. The memo reveals that in discussing the Reilly site with McPhee, Koonce said:

"This is primarily a local problem
and should be handled as such."

In addition, RTC ex. 85, Mr. Popham's memo to PCA lawyer Eldon Kaul of November 27, 1974, indicates (p. 1):

"...the PCA advised the city in 1969 that the situation was a local problem and should be handled locally."

Similarly, in May a background paper submitted by Mayor Frank G. Fleetham, Jr. to Dr. Howard Anderson (then Chairman of the PCA Board) November 15, 1974 (attached hereto as Exhibit G and made a part hereof), Mayor Fleetham says:

"In May of 1969 the MPCA staff advised the City that the problem was a local one and should be handled by the City."

After these 1969 communications, at a PCA Board meeting held September 14, 1970, the Board was asked by Mayor Frank Howard to join the City in necessary enforcement action (RTC ex. 7) and the result was the lawsuit filed October 5, 1970 (RTC ex. 8). It appears from the documents that the principal actor on behalf of the State at that time was Mr. George R. Koonce. A memorandum dated February 2, 1972 from McPhee reporting a telephone conference between him and Koonce states:

"Mr. Koonce indicated that if the City acquires the property, their office (the Minnesota PCA) would close the matter (the Reilly litigation) and it would be up to us to solve our own problems."
(Underlining supplied - document inadvertently marked twice as RTC ex. 30 and 48.)

This is precisely how Reilly perceived the negotiations. Reilly's offer to the City and the State (made through the City) was that it would sell the property to the City if it would be accepted by the City and the State "as is" - i.e.,

free of "any and all questions of soil and water impurities and soil conditions. . . ." RTC ex. 31. The Agreement explicitly recites that:

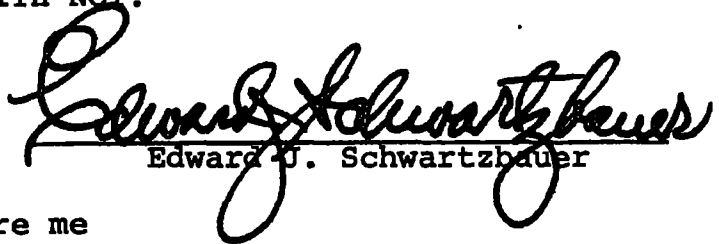
"It is understood that this agreement represents a means of settling the issues involved in State of Minnesota, by the Minnesota Pollution Control Agency and the City of St. Louis Park, Plaintiffs, vs. Reilly Tar & Chemical Corporation, Defendant, Hennepin County, Minnesota District Court Civil File No. 670767." (underlining in original) Ibid.

This agreement spoke in the present tense, not future, and did not purport to be a settlement solely with the City but purported to be and was understood by Reilly as a settlement with both plaintiffs. The subsequent delivery of a written dismissal was merely ministerial. See Thomas E. Reiersgord affidavit of June 23, 1983, par. 15, p. 7-8, and affidavit of September 5, 1983. We believe that the understanding between all three parties as of April 14, 1972, was that since the City and Reilly had come to terms and the City had become the owner and responsible for correcting the conditions, the lawsuit against Reilly would never be reinstated. This was a three-party agreement, although Reilly's communications were solely with the City, as agent for the State.

The deposition of George R. Koonce was scheduled by Reilly for September 15, 1982. However, shortly before that, I was advised by Stephen Shakman, one of the attorneys for the State of Minnesota, that Koonce had become permanently disabled

by an accident in which he had been electrocuted and that he had both physical and mental disabilities. I visited Koonce at his home with Shakman and my associate, Becky A. Comstock, at that time. We found Koonce in his apartment. He was dressed only in his underwear shorts. He had beside him a stack of pills, approximately six inches high, twelve inches wide and twelve inches long. Although he seemed to be able to hear us, he had extreme difficulty understanding difficult questions, and could respond intelligibly only to simple ones. He had a marked speech difficulty; therefore, when he responded, it was difficult to understand him. Overall, it was impossible to determine whether he could not understand me or I could not understand him. We did learn that although he lives alone, a charitable institution (I believe "meals on wheels") brings him his food because he is unable to prepare his own. My judgment was that Koonce could not be a reliable witness, although the only agreement between counsel at that time was that we would "defer" taking Koonce's deposition, at least until we had finished other witnesses involved in the settlement negotiations.

FURTHER AFFIANT SAITH NOT.


Edward J. Schwartzbauer

Subscribed and sworn to before me
this 15th day of September, 1983.

November 15, 1974

CITY OF ST. LOUIS PARK
DATA REGARDING THE HISTORY AND DEVELOPMENT
OF A STORM SEWER SYSTEM FOR THE CITY IN THE
AREA OF THE FORMER REPUBLIC CREOSOTE PROPERTY

BACKGROUND

In 1962, St. Louis Park began a city-wide storm sewer construction program to provide adequate drainage for all areas of the community. One of the earliest areas in which storm sewers were proposed was the central portion of the City in which the Republic Creosote plant was situated. However, for many years Republic Creosote has disposed of its industrial wastes onto the surface of the ground, and it was recognized that any storm sewer drainage project in that area would transport these wastes directly into Minnehaha Creek.

In 1968, the City requested the assistance of the Minnesota Pollution Control Agency in halting the pollution activities of Republic Creosote, which involved both the industrial waste discharges to the surface of the ground and also air pollution. The City asked the MPCA and the Department of Health whether there were any hazards to the underground waters and adjacent water courses which may have resulted from this on-land disposal. Surveys were made of the effluents leaving the plant site, and the staff of the MPCA agreed that abatement action was needed. Although a letter was written to the Republic Creosote plant manager by the MPCA in November of 1968 requesting immediate plans for plant waste treatment facilities, no action was taken by Republic Creosote.

In May of 1969 the MPCA staff advised the City that the problem was a local one and should be handled by the City. The City then began its own efforts to force corrective action.

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Possible Groundwater Contamination - Because of the possibility of potential groundwater pollution from the Republic Creosote Company, St. Louis Park engaged the services of professional hydrologists to survey and sample the wells in the city. Preliminary findings showed low levels of phenols in several municipal wells used for drinking water.

Analyses by two independent laboratories and the St. Louis Park Tri City Laboratory showed phenols in all of the water bearing strata, including the Hinckley sandstone, into which municipal wells penetrated. Minnesota State Health Department staff indicated to the city that these tests were erroneous, and on April 20, 1970 Mr. R.E. Frazier, Chief, Section of Analytical Services stated, "it is highly unlikely that phenols can persist for long periods of time in dilute solution in biologically active portions of the soil, and it is inconceivable that phenols discharged to the surface of the grounds in the St. Louis Park area could reach the Hinckley sandstone". In order to settle the question as to whether or not phenols were actually present in the municipal wells, the City offered to retain the services of the NUS Corporation (capable of doing the most sensitive phenol analysis possible) to sample the wells. In November of 1970, the NUS Corporation was unable to find any phenols or phenolic compounds in the waters of any of the wells sampled.

Legal Action - In September of 1970, the MPCA agreed to join with the City in action against Republic Creosote to abate its pollution activities. Because of the opinion of officials of the State Health Department that phenols were present in municipal wells and their insistence that no health hazard existed, the suit did not contain any allegations of ground water contamination.

Republic Creosote Closing/Purchase of Land - In February of 1971 Republic Creosote decided to close its plant in St. Louis Park, and the company began discontinuing

certain plant operations in September of 1971. At that time, the City began negotiating with Republic Creosote for the purchase of the entire site.

One of the major points of contention during the land negotiation was the amount and responsibility of rehabilitation to those portions of the site where industrial wastes had been deposited. The city was very concerned about buying this property if there were any major soil contamination problems. In order to determine the exact amount of rehabilitation which would be required, the City requested the assistance of the MPCA in determining corrective measures.

In early 1972, as the land negotiations progressed, the City again contacted the MPCA regarding land rehabilitation requirements. Staff of the MPCA indicated to the City that if the City acquired the property, one foot of sealing clay placed over the contaminated ground area should be sufficient rehabilitation.

Based on the statements from the MPCA staff, the City of St. Louis Park entered into an agreement to purchase the Republic Creosote property.

PROPOSED LAND IMPROVEMENT AND USE

The former Republic Creosote site, which is now owned by the St. Louis Park Housing and Redevelopment Authority, is a proposed neighborhood development project. The project will provide approximately 800 housing units (20% of which will be for low income and elderly persons), open space and park areas, and a small convenience shopping area. The extension of Louisiana Avenue (the major north-south thoroughfare in the City) has been constructed along the east side of the property and a pedestrian bridge linking the proposed neighborhood development to the businesses and schools to the east has been constructed.

Development Grant - The City's application for a Neighborhood Development Program to develop the former Republic Creosote site was approved by the Department of Housing and Urban Development, with HUD's contribution to be 75% of the net cost of the project. Some questions were raised initially regarding the buildability of the site, however, after technical data on soil conditions, etc. was provided the NDP grant was approved. One of the commitments of the City under the contract with the federal government is to provide certain non-cash credits in the form of public improvements (i.e. storm sewer, park and open spaces, etc.).

Storm Sewer Construction - In October of 1972, the City selected the firm of Orr-Schelen-Mayeron & Associates to design the much needed storm sewer system for the central part of the City, including the former Republic Creosote site. The primary requirement of the storm sewer design initially was to meet the effluent discharge requirements of the Minnehaha Watershed District. This was done and the Watershed Board of Commissioners complimented the City for its environmental concerns.

Beyond the Watershed District requirements, the City voluntarily sought to work with Minnesota Pollution Control Agency and Minnesota State Health Department because of the previous alleged pollution problems with surface water on the creosote site. As a result of the need to protect the water quality of surface runoff, a number of design features such as lined settling basins, a treatment plant, and land farming techniques have been incorporated in the storm sewer system plans.

The MPCA staff recently decided to require the submission and approval of the following two permits:

1. An NPDES permit to discharge storm water into Minnehaha Creek, because the storm water drainage is considered a point source of pollution.

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2. An MPCA permit for industrial land farming techniques of excavated soils.

The City believes, as well as do the various consultants and experts retained by the City, that the pollution control measures incorporated into the storm sewer system design will adequately meet the requirements of the two permits. The land farming technique uses the natural soil processes to break down the greases and oils. This technique has been demonstrated to be successful through a series of pilot studies and lab analyses.

The MPCA has related the surface water pollution abatement program to the phenols that have been detected in the groundwater and to any rehabilitation program that may be needed for the groundwater. The City considers the surface water and groundwater as two distinct and separate problems. However, the City hired a hydrogeologist to study the problems of the groundwater and to recommend measures to prevent the spread of any contaminants.

SUMMARY

The City, through its various consultants, has worked closely with the MPCA from the outset in solving the various problems with the former Republic Creosote site. Extraordinary design features and safeguards have been developed at a great cost to insure that the stormwater discharge meets all necessary requirements. The storm drainage system is definitely needed in the central part of the City and continued delays are increasing construction costs at a rapid rate.

The City is requesting that the necessary permits be issued so that the storm sewer construction and the rehabilitation work can begin.